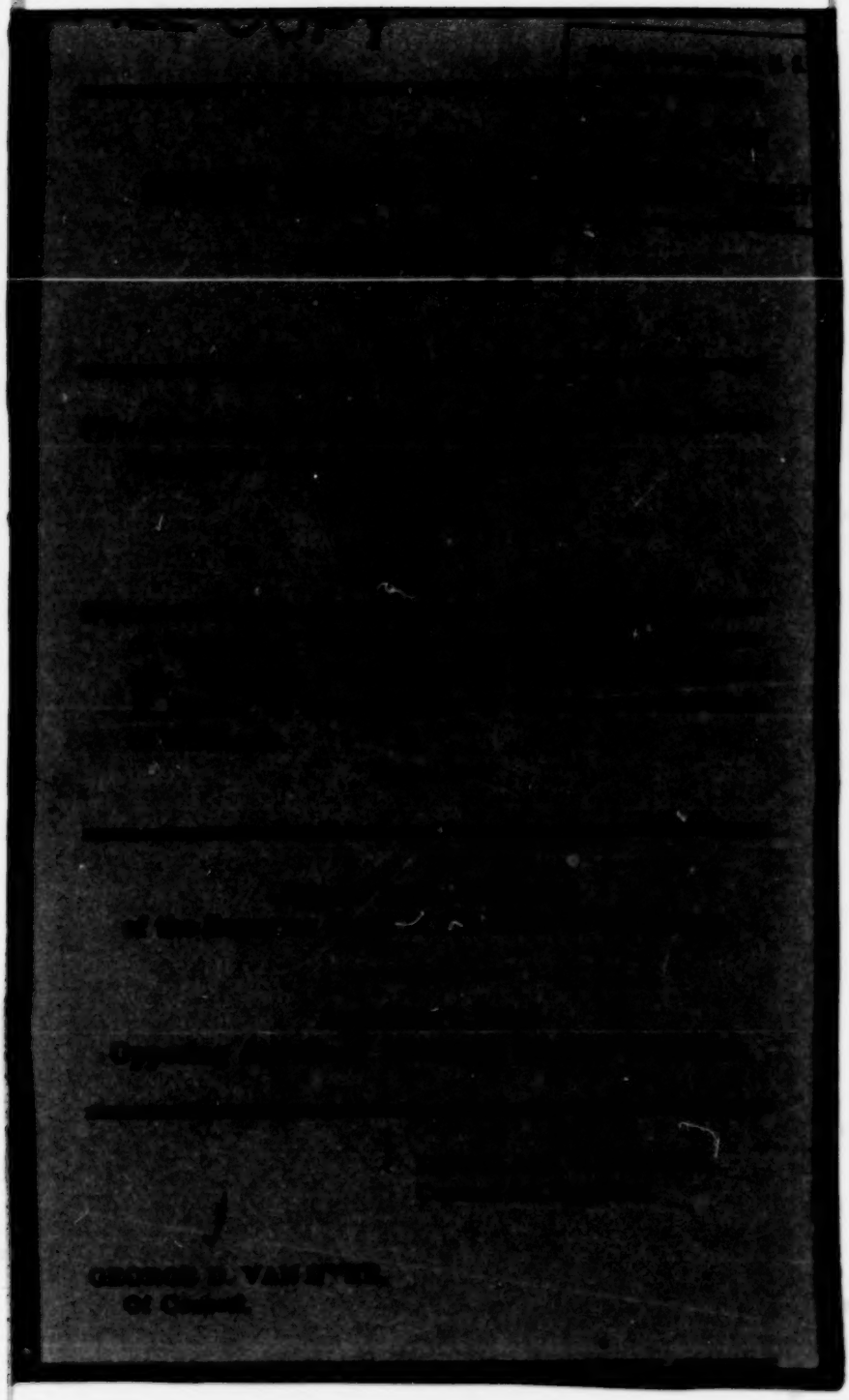

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

Number .....

First Wisconsin Trust Company, as Trustee under Trust Agreement dated December 6, 1935,

Appellant,

vs.

Wisconsin Tax Commission; John C. Leenhouts, Assessor of Incomes of Milwaukee County; *State of Wisconsin; Wisconsin Department of Taxation*, and *Elmer E. Barlow*, as Commissioner of Taxation of the State of Wisconsin,

Appellees.

Appeal from Judgment
of the Supreme Court of the State of Wisconsin.

Appellant's Brief Opposing Appellees' Motion to Dismiss or Affirm.

Pursuant to paragraph 3 of Rule 2 of the Rules of the United States Supreme Court, appellant files this brief opposing appellees' motion to dismiss or affirm.

Nature of the Case.

This appeal is from a judgment of the Supreme Court of the State of Wisconsin, entered June 4, 1940, affirming an assessment of a gift tax imposed by the statutes of Wisconsin.

This suit was consolidated for hearing before the Income Tax Board of Review with a suit involving a similar gift, by the same donor at the same time, and heard by the Circuit Court for Milwaukee County and by the Supreme Court of Wisconsin on a combined record.

The questions of law in both cases are identical, and the argument in this brief is identical with the argument in the brief in the companion case.

A separate assessment was made, and a separate judgment was entered in each case.

Appeals to this court were allowed by the Chief Justice of the Supreme Court of the State of Wisconsin, on June 20, 1940, in both cases.

The ground for invoking jurisdiction of this Court was that imposition of the tax violated the XIV Amendment to the Constitution of the United States, because imposed without jurisdiction.

The motion to dismiss the appeal, or affirm the judgment, raises the question of whether a substantial federal question is presented, on which question this brief is submitted.

Reference to Official Report of Opinion.

The opinion in this suit (R. pp. 145-160), of the Supreme Court of the State of Wisconsin, which is the highest court of said State in which a decision in the suit could be had, is reported in 235 Wisconsin Reports 128, as appears from the advance sheets—the bound volume not having been

published as yet. It also appears in the advance sheets of the Northwestern Reporter, Volume 292 N. W. Rep. 313.

The opinion of the Circuit Court for Milwaukee County is not published. It appears at R. pp. 124-140.

Grounds on Which Jurisdiction of This Court is Invoked.

The date of the judgment of the Supreme Court of the State of Wisconsin sought to be reversed is June 4, 1940, and the date upon which the appeal to this court was allowed by the Chief Justice of the Supreme Court of the State of Wisconsin, is June 20, 1940.

The statutory provisions believed to sustain the jurisdiction are Section 344 (Judicial Code, Section 237 amended), Section 861a and Section 861b, Title 28 U. S. Code Annotated.

The precise ground on which jurisdiction of this Court is invoked is that in this suit there was drawn in question the validity of Section 4 of Chapter 363, Wisconsin Laws of 1933, pages 795 to 800 as amended to extend the time of the operation of the Law to July 1, 1937, by Section 7, Chapter 15, Wisconsin Laws of 1935, page 30, imposing an emergency gift tax, on the ground that said statute was repugnant to section 1 of the XIV Amendment to the Constitution of the United States, if construed and applied as imposing the tax on a gift of silver dollars made by delivery thereof in the State of Illinois, by a resident of the State of Wisconsin, because the State of Wisconsin lacked jurisdiction to tax such gift, and to do so would deprive appellant of property without due process of law.

The decision and judgment of the Supreme Court of the State of Wisconsin, which is the highest court of said state in which a decision in the suit could be had, was in favor

of the validity of said statute construed as imposing the tax on such gift.

Jurisdiction of the appeal is sustained by *Frick vs. Pennsylvania*, 268 U. S. 473, at 501, 69 L. Ed. 1058, 45 S. Ct. 603.

The motion to dismiss the appeal or affirm the judgment challenges the substantial nature of the federal question involved. The substantial nature of this question is hereinafter discussed.

Statement of Case.

Substantially all the facts are set forth in an affidavit by George D. Van Dyke, R. pp. 102-108, attached as Exhibit "B" to the objections to the assessments, Exhibits 2a and 2b admitted R. p. 83, which affidavit he testified contained the facts (R. p. 82).

References to the affidavit are designated by the letter B following the page number.

George D. Van Dyke, a citizen of the United States, residing at Milwaukee, Wisconsin (R. p. 82, 102 B), and a lawyer by profession, made two gifts each of 135,000 silver dollars, at Chicago, Illinois, on December 6, 1935 (R. p. 102 B).

He had previously owned United States First Liberty 3 1/2% gold bonds of the par value of $270,000, of which bonds of the par value of $220,000 were registered in his name (R. pp. 102-103 B).

Said bonds, by their terms, were exempt from taxation, except estate and inheritance taxes (R. p. 103 B).

He had contemplated testing the right of Wisconsin and of the United States to impose a gift tax on the transfer of these bonds (R. p. 104 B).

The bonds, however, were called for redemption as of June 15, 1935, to be presented for payment at the Treasury of the United States, or a Federal Reserve Bank or branch (R. p. 104 B). Other banks were not agents of the United States for this purpose (R. pp. 104-105 B, Exhibit 1b, R. pp. 83, 95, 96).

He did not care at his own risk to use a Milwaukee bank as his agent and obtain a large credit at such bank, pending reinvestment (R. p. 105 B). Moreover, he saw no opportunity to invest in similar tax-exempt securities, and the income of taxable securities would fall in the higher brackets and greatly increase his income taxes (R. p. 105 B).

He continued to hold the bonds until November 15, 1935, while investigating the right of the government to call the bonds for payment in a depreciated currency, instead of gold (R. p. 104 B).

He then saw in the situation an opportunity to make the gifts which he had had in contemplation, and test some of the legal questions which he desired to raise, because he had always resisted extensions of the taxing power beyond constitutional or jurisdictional limitations (R. p. 105 B).

He ascertained on November 15, 1935, that he could collect the bonds in silver dollars (R. p. 105 B).

On November 22, 1935, he delivered the bonds to the First National Bank of Chicago, as his agent, for collection in silver dollars, at the Federal Reserve Bank at Chicago, which is the nearest Federal Reserve Bank or branch to the State of Wisconsin (R. p. 105 B). The Federal Reserve Bank did not then have on hand the requisite number of silver dollars (R. p. 105 B). On December 3, 1935, he received a notification of the receipt of the silver dollars at Chicago, Illinois (R. pp. 105-106 B).

On December 6, 1935, the said George D. Van Dyke, accompanied by his son, Douglass Van Dyke, who took with

him a power of attorney from William D. Van Dyke, Jr., went to Chicago where they met Mr. George Luhman, President of the First Wisconsin Trust Company of Milwaukee, Wisconsin, at the First National Bank of Chicago (R. p. 106 B).

Two trust instruments were then executed in the presence of officers of the First National Bank of Chicago, with the exception of the signature of William D. Van Dyke, Jr., who had previously executed one of the trust instruments as a trustee, at Milwaukee, Wisconsin (R. p. 106 B).

The trust agreement under which the First Wisconsin Trust Company is trustee, was created primarily for the support and education of four foster-children of Louise Van Dyke Hauxhurst, who takes no interest in the trust. The income is to be disbursed in her discretion, and she can terminate the trust and take the trust estate at any time. If not terminated, the trust estate is payable on the death of all of the foster-children, to the said Louise Van Dyke Hauxhurst, if living, or if she is deceased, then to such persons as she shall have appointed by her will, and in default of such appointment then to the heirs at law of George D. Van Dyke (Exhibit 3b, R. p. 84; 109 at 112-115).

George D. Van Dyke reserved no interest in or control of any kind or character over the trusts (R. p. 107 B).

He never had the slightest intent of bringing the silver dollars to Wisconsin (R. p. 107 B).

The trustee was not authorized to take the silver dollars to Wisconsin (Exhibit 3b, R. p. 84; 112).

In both trust agreements the trustees were directed to make full disclosure to the taxing authorities of the State of Wisconsin, and in their discretion to contest and litigate at the expense of the trust estates, any gift tax liability sought to be imposed in respect to said gifts (R. p. 108 B).

The parties then went to the Federal Reserve Bank at Chicago, Illinois, where the silver dollars were stored in private vaults of the First National Bank of Chicago (R. p. 106 B).

George D. Van Dyke receipted to the First National Bank of Chicago for the silver dollars, and delivered 135,000 silver dollars to Douglass Van Dyke, trustee, who receipted for the same on behalf of himself as trustee, and his co-trustee, William D. Van Dyke, Jr., for whom he acted under a power of attorney (R. p. 107 B).

George D. Van Dyke then delivered 135,000 silver dollars to Mr. Luhman, as President of the First Wisconsin Trust Company, who receipted for the same on behalf of said First Wisconsin Trust Company, as trustee (R. p. 107 B).

On the same day the First Wisconsin Trust Company delivered the 135,000 silver dollars to the First National Bank of Chicago, and at its request said amount was credited to the account of the First Wisconsin National Bank of Milwaukee, which bank credited the account of the First Wisconsin Trust Company of Milwaukee, as trustee (R. p. 92).

On said day Douglass Van Dyke delivered the 135,000 silver dollars received by him and by William D. Van Dyke, Jr., as trustees, to the First National Bank of Chicago, where an account was opened in their names as trustees. They substantially completed investment of the fund about the middle of April 1936, at which time they opened an account in the Marine National Exchange Bank, of Milwaukee, Wisconsin, to which account they transferred three or four thousand dollars (R. pp. 92-93).

Douglass Van Dyke and his cousin, William D. Van Dyke, Jr., are both residents of the City of Milwaukee, Wisconsin, and First Wisconsin Trust Company is a Wisconsin corporation located at Milwaukee, Wisconsin (R. p. 93).

The trustee of the trust here involved filed a donee's gift tax return with the proper taxing officers of the State

of Wisconsin, attaching a copy of the trust agreement, and protesting that the transfer was not subject to the Wisconsin gift tax (Exhibit 5a, R. p. 86; 119-120).

George D. Van Dyke, as donor, also filed a donors' gift tax return (R. p. 85).

The assessor of incomes notified the trustees that the gifts were subject to a tax under the laws of Wisconsin, and that taxes would be certified for collection unless within twenty days a written protest was filed in his office (Exhibit 6a, R. p. 87; 121). Protests were filed (R. p. 88). Proceedings were had before the County Board of Review in which the two matters were consolidated for hearing, and the Board sustained the tax assessments (R. pp. 79-80). Appeals were then taken to the Wisconsin Tax Commission, which entered an order confirming the assessments (R. pp. 71-77). Appeals were taken to the Circuit Court for Milwaukee County, Wisconsin, where judgments affirming the assessments were entered on December 15, 1939 (R. pp. 141-142). Appeals were taken to the Supreme Court of Wisconsin, which entered judgments on June 4, 1940, affirming the judgments of the Circuit Court for Milwaukee County, Wisconsin (R. p. 143).

Specification of Errors.

All of the assigned errors are intended to be urged in support of the contention that a substantial federal question is presented.

The errors assigned are:

1. In this suit there was drawn in question the validity of Section 4, Chapter 363, Wisconsin Session Laws of 1933, as amended by chapter 15, Wisconsin Session Laws of 1935, imposing an emergency gift tax, on the ground

that said statute was repugnant to section 1 of the XIV Amendment to the Constitution of the United States if construed and applied as imposing the tax on a gift of silver dollars made by delivery thereof in the State of Illinois, by a resident of the State of Wisconsin to a Wisconsin corporation in trust for a resident of Wisconsin, because the State of Wisconsin lacked jurisdiction to tax such gift, and to do so would deprive appellant of property without due process of law, and the decision of the Supreme Court of the State of Wisconsin was in favor of the validity of said statute construed as imposing the tax on such gift, which decision is hereby assigned as error.

2. Said Court further erred in holding in its said decision that the silver dollars at the time of the gift had acquired a constructive taxable situs at the domicil of the donor.

3. Said Court further erred in holding in its said decision that the gift was in substance a transfer of intangibles having a constructive taxable situs at the domicil of the donor.

4. Said Court further erred in holding in its said decision that jurisdiction of Wisconsin to tax the actual transfer of the silver dollars in Illinois, could be predicated upon a constructive situs at domicil of donor of the property transferred, whether deemed tangible or intangible.

SUMMARY OF ARGUMENT.

The Wisconsin Emergency Gift Tax Act Construed as Imposing the Tax on a Gift of Silver Dollars Made by Delivery Thereof in Chicago, Illinois, is Repugnant to Sec. 1 of the XIV Amendment to the Constitution of the United States, Because the Tax so Imposed Would Deprive the Taxpayer of Property Without Due Process of Law by Reason of Wisconsin's Lack of Jurisdiction to Impose the Tax.

I — Nature of the Tax.

The tax is an excise on transfers *inter vivos* by gift, or by sale or exchange for an inadequate consideration.

II — Construction of the Statute.

The Supreme Court of Wisconsin construed the statute as authorizing the imposition of the tax on a gift of silver dollars made by delivery thereof in Chicago, Illinois.

III — Wisconsin Lacks Jurisdiction to Impose a Gift Tax on a Gift Completely Consummated in Another State.

A — Basis of jurisdiction to impose the tax.

Illinois, the state where the gift was made and completely consummated, had exclusive jurisdiction to impose a gift tax, because it regulated and protected the right to make the transfer, and the validity thereof was governed by its laws. Wisconsin contributed nothing. Domicil of the

parties, or the fiction of constructive situs of the property transferred, is immaterial.

B — Jurisdiction to impose other types of taxes distinguished.

To overturn the established basis of jurisdiction for imposition of a gift or sales tax, appellees refer to analogies in other fields of taxation where jurisdiction is predicated on fictions invoked for reasons not applicable to a gift or sales tax.

(1) Jurisdiction to impose an annual property tax is not analogous.

The annual personal property tax is not imposed in respect to a single event, as is the gift tax, but annually, by the state of domicil, for the protection ordinarily afforded by such state during the entire year. The property, though temporarily located elsewhere, is assumed to have a constructive taxable situs at domicil for the purpose of this tax.

Such constructive situs does not confer jurisdiction to impose an excise on an actual transfer of the property in another state.

Moreover, the tangible silver dollars here involved never acquired a constructive situs at domicil of donor.

(2) Jurisdiction to impose the income tax is not analogous.

The income tax is an annual tax which has been substituted for the annual personal property tax. It is imposed where the income is received. As income is payable at domicil, it is received at domicil in the exercise of a right protected by the state of domicil. A gift is not payable at domicil. The right to make or receive a gift is enjoyed where the gift is actually made.

(3) Jurisdiction to impose an estate or inheritance tax is not analogous.

(a) For the purpose of inheritance taxation, personal property, although temporarily located in another state, is assumed to have a constructive situs at domicil, because, by comity the succession to it is in accordance with the laws of the state of domicil.

Such constructive situs of property at death does not confer jurisdiction to impose an excise on an actual transfer of the property in another state.

Moreover, if donor had died before making the gift, the tangible silver dollars, stored in a vault in Illinois, would not have had a constructive situs at his domicil in Wisconsin.

(b) The state of domicil may impose reasonable conditions on the privilege or license of succeeding to the estate of decedent, including a condition that its estate tax be measured by property never belonging to decedent, or given away by him in contemplation of death.

Jurisdiction of the making of the gift is not essential. The question is whether it is reasonable for the state of domicil to include in the measure of its estate tax the value of the gift made in contemplation of death.

In the case of a gift tax on a gift *inter vivos* not made in contemplation of death, jurisdiction of the making of the gift is essential.

Pearson vs. McGraw, 308 U. S. 313, 84 L. Ed. 139, 60 S. Ct. 211 is distinguishable on that ground.

C — Tax avoidance can not be made the basis of jurisdiction to impose the tax.

Pearson vs. McGraw, 308 U. S. 313, 84 L. Ed. 139, 60 S. Ct. 211, does not overturn this established rule, because

in that case jurisdiction of the making of the gift was not involved. The question was the reasonableness of the condition, imposed by Oregon on the succession to the estate, that the value of the gift be included in the measure of the estate tax which it had jurisdiction to impose.

IV — A State Tax Imposed Without Jurisdiction Violates Section 1 of the XIV Amendment to the Constitution of the United States.

V — A Substantial Federal Question is Presented.

The important federal question presented is whether the State of Wisconsin may impose a tax on the exercise by one of its residents, in another state, of his natural right to make a transfer of his property by gift, even though made in another state for the express purpose of avoiding the Wisconsin gift tax.

ARGUMENT.

The Wisconsin Emergency Gift Tax Act Construed as Imposing the Tax on a Gift of Silver Dollars Made by Delivery Thereof in Chicago, Illinois, is Repugnant to Sec. 1 of the XIV Amendment to the Constitution of the United States, Because the Tax so Imposed Would Deprive the Taxpayer of Property Without Due Process of Law by Reason of Wisconsin's Lack of Jurisdiction to Impose the Tax.

I.

Nature of the Tax.

The tax is a temporary emergency excise tax imposed on transfers *inter vivos* by gift, or by sale or exchange for an inadequate consideration.

The tax is imposed by Section 4 of Chapter 363, Wisconsin Session Laws of 1933, pages 795-800 as amended to extend the time of the operation of the law to July 1, 1937, by Section 7, Chapter 15, Wisconsin Session Laws of 1935, page 30.

The pertinent provisions of the statute as amended are as follows (Italics ours):

> Section 4. *Emergency Gift Tax.* (1) An emergency tax is imposed upon transfers of property, real, personal or mixed, or any interests therein or income therefrom in trust or otherwise, to any person, association or corporation, which are made subsequent to the effective date of this act and prior to July 1, 1937, in the following cases, except as hereinafter provided:

(a) When the transfer is by gift from any person who at the date of such gift was a resident of the state.

(b) When the transfer is by gift of property within the state or within its jurisdiction and the donor was a non-resident of the state at the date of such gift.

(c) *No tax shall be imposed upon the transfer of any property which is taxable under the inheritance tax law of this state,* and any tax paid upon the transfer of any property under the provisions of this section may be applied as a credit upon any inheritance tax which may be imposed under the inheritance tax law upon the same transfer, and *no tax shall be imposed upon any tangible personal property of a resident donor when such property is located without this state; provided, however, such property is not without this state temporarily.*

(2) (a) If the transfer is made in property, the clear market value thereof at the date of the gift shall be considered the taxable value of the gift. Where property is *sold or exchanged for less than a fair consideration* in money or money's worth, then the amount by which the clear market value of the property exceeded the consideration received shall, for the purposes of the tax imposed by this chapter, be deemed a gift and shall be included in computing the amount of gifts made during the year.

It should be observed that the statute imposes the gift tax on two classes of gifts specifically mentioned: one from a non-resident when the property is within the state or within its jurisdiction, and the other "from a person who at the date of such gift, was a resident of the state," regardless of where the gift is made or of the nature or location of the property, but "no tax shall be imposed upon any tangible personal property of a resident donor when such property is located without this state; provided, however, such property is not without this state temporarily."

In the case at bar we are concerned only with the latter case; for the donor, a resident of Wisconsin, went outside the state to Chicago, Illinois, and there made and completed the gift of silver dollars then physically located in Illinois, by manual delivery thereof.

It should also be observed that the tax is an excise tax imposed not only on transfers by gift, but by sale or exchange for an inadequate consideration. It is analogous to a sales tax because the distinction between a gift and a sale is merely the adequacy of the consideration. Like a sales tax, it is imposed on an actual transfer of property by act of the parties in the exercise of their natural rights and may not be imposed on a transfer made without the state.

Though the gift tax act probably is supplemental to or in *pari materia* with the inheritance tax act, Wisconsin for that reason, cannot extend its jurisdiction so as to tax gifts consummated beyond its borders, because an individual cannot be stripped of his constitutional rights, even if this seems necessary in order to prevent avoidance of the Inheritance Tax Act.

Heiner vs. Donnan, 285 U. S. 312, at 328, 76 L. Ed. 772, 52 S. Ct. 358, at 362;

Hoeper vs. Tax Commission of Wisconsin, 284 U. S. 206, at 217, 76 L. Ed. 248, 52 S. Ct. 120, at 122;

Schlesinger vs. Wisconsin, 270 U. S. 230, at 240, 70 L. Ed. 557, 46 S. Ct. 260, at 261.

Federal gift and estate taxes do not involve questions of jurisdiction as between states.

II.

Construction of the Statute.

The language of the statute "and no tax shall be imposed upon any tangible personal property of a resident donor when such property is located without this state; provided, however, such property is not without this state temporarily" seems to be unambiguous.

The Supreme Court of the State of Wisconsin in its decision R. p. 145, notwithstanding that the word "located" had been given its ordinary meaning in *Bayfield County vs. Pishon,* 162 Wis. 466, construed such word as meaning constructive situs of the property transferred, at domicil of the donor. The court then argues that the silver dollars had a constructive situs at the domicil of the donor in Wisconsin, though they had never been within that state, and donor and donees at no time intended to take them there. The court then concludes that by reason of such constructive situs of the silver dollars at domicil of donor, Wisconsin had jurisdiction to impose the gift tax on the actual transfer of the silver dollars by manual delivery at Chicago, Illinois. Such construction of the statute renders it unconstitutional by reason of Wisconsin's lack of jurisdiction to impose the tax on the gift actually consummated in Chicago, Illinois. The judgment and decision of the Supreme Court of the State of Wisconsin sustaining the constitutionality of the statute as so construed, is assigned as error. This presents the important federal question hereinafter discussed.

III.

Wisconsin Lacks Jurisdiction to Impose a Gift Tax on a Gift Consummated in Another State.

A — Basis of jurisdiction to impose the tax.

The state where the gift is actually made has exclusive jurisdiction to impose the gift tax thereon, because such state regulates and protects the right of making the transfer, and the validity thereof is governed by its laws.

This proposition is well stated in *Great Atlantic & Pacific Tea Co. vs. Grosjean*, 301 U. S. 412, at 424, 81 L. Ed. 1193, 57 S. Ct. 772 at 776-777, as follows (Italics ours):

> "The state may not tax real property or tangible personal property lying outside her borders; *nor may she lay an excise or privilege-tax upon the exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed.*"
>
> *Connecticut General Life Ins. Co. vs. Johnson*, 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436;
>
> *Graniteville Mfg. Co. vs. Query*, 283 U. S. 376, 75 L. Ed. 1126 L. Ed. 51 S. Ct. 515;
>
> *Hatch vs. Reardon*, 204 U. S. 152, 51 L. Ed. 415, 27 S. Ct. 188;
>
> *Beale*, Conflict of Laws (1935) Vol. 1, pg. 623, § 118 F. 2.

The actual transfer by manual delivery of the silver dollars in Chicago, Illinois, constitutes the exercise of rights regulated and protected by the laws of Illinois, and the validity of the transaction is governed by Illinois law.

This proposition is well stated in *United States vs. Guaranty Trust Co.*, 293 U. S. 340, at 345, 346, 79 L. Ed. 415, 55 S. Ct. 221, at 223, as follows (Italics ours):

"But under settled principles of conflict of laws, adopted by both federal and state courts, the validity of a transfer of a *chattel* brought into a country by the consent of the owner is governed by its law; *and that rule applies to negotiable instruments.*"

American Law Institute, Restatement Conflict of Laws, paragraphs 49, 52, 255-257;

Beale, Conflict of Laws (1935), Vol. II § 255.5 pg. 981, § 262.1 pg. 984, § 294.2 pg. 1018, § 294.3 pg. 1019;

Alcock vs. Smith (1892), 1 Chan. 238.

The above citations disclose that it is immaterial whether the silver dollars are deemed tangibles or intangibles like bearer negotiable instruments, because title to either passes on delivery in accordance with the law of the place where delivery is made.

Domicil of the parties is immaterial.

Hatch vs. Reardon, 204 U. S. 152, at 161, 51 L. Ed. 415, 27 S. Ct. 188, at 191.

Constructive situs of the property at domicil of the owner, under the fiction of *mobilia sequuntur personam,* is also immaterial when the property is actually transferred by delivery in another state.

Foppiano vs. Speed, 199 U. S. 501, at 520, 50 L. Ed. 288, 26 S. Ct. 138, at 141.

The basis of jurisdiction for the gift tax is the same as for sales taxes, stock transfer taxes, or other excise taxes, imposed upon the exercise of rights or privileges in a state selected by the parties.

The basis of jurisdiction to impose other types of taxes will now be examined in order to demonstrate that analogies can not be drawn therefrom.

B — Jurisdiction to impose other types of taxes distinguished.

The Wisconsin Tax Commission, Circuit Court for Milwaukee County, and Supreme Court of the State of Wisconsin have ignored the decisions of this court holding that a state lacks jurisdiction to impose an excise tax like the gift or sales tax on a transfer consummated in another state. In their eagerness to find some basis for jurisdiction, they seek to draw analogies from jurisdiction to impose entirely different types of taxes where the basis of jurisdiction is predicated on fictions invoked for reasons not applicable to taxation of gifts or sales.

It is universally recognized that fictions invented for a particular purpose can not logically be used by way of analogy to support some other proposition. If we start with a false premise we must necessarily reach a false conclusion. For example, the fiction that man and wife are one, though useful for some purposes, can not be made the basis of an argument that their separate incomes should be taxed together.

Hoeper vs. Tax Commission of Wisconsin, 284 U. S. 206, 76 L. Ed. 248, 52 S. Ct. 120.

(1) Jurisdiction to impose an annual property tax is not analogous.

The annual property tax is not imposed in respect to a single act or event, as is the gift tax.

It is imposed for the protection ordinarily afforded during the entire year by the state of domicil of the owner, and such state, rather than several states, in each of which the property might be temporarily located during the year, rightfully imposes the tax.

It would not constitute due process of law under the XIV Amendment to the Constitution of the United States, for each state in which property might come for a brief period, to impose thereon an annual tax for a year's protection.

See discussion of *Hays vs. Pacific Mail Steam-ship Company,* 17 Howard 596, by Professor Joseph H. Beale, in an article entitled "Social Justice and Business Costs" 49 *Harvard Law Review* 593, at 597, 598.

For imposition of the annual property tax, personal property temporarily without the state is said to have a constructive taxable situs at domicil. The maxim or fiction of *mobilia sequuntur personam* is sometimes invoked to support this desirable conclusion.

Beale, Conflict of Laws (1935), Vol. 1 § 118 F. 2, pg. 623.

The fiction does not apply to tangible personal property which is permanently without the state of domicil of the owner.

Wheeling Steel Corporation vs. Fox, 298 U. S. 193, 80 L. Ed. 1143, 56 S. Ct. 773.

The silver dollars were tangible personal property.

Blodgett vs. Silberman, 277 U. S. 1, 72 L. Ed. 749, 48 S. Ct. 410.

Tangible personal property, as the derivation of the word "tangible" signifies, is personal property which can be handled or touched with the fingers.

Coins constituted one of the earliest forms of tangible personal property. They constituted the tangible wealth of the owner hidden in his cache or strong box, or displayed as personal ornaments.

Mr. Justice Story, in *United States vs. Moulton*, 5 Mason 537, assumes that coins are tangible, and then discusses whether bank notes by custom have become sufficiently like coins to be treated as tangible personal property, at least for some purposes.

The silver dollar, unlike a treasury note, contains no promise to pay. If lost, the owner has lost the thing itself and he is never reimbursed as sometimes is the case in respect to government bonds or paper money.

The silver dollars were never within Wisconsin, and there was no intention to bring them to Wisconsin, but to give them away in Chicago, Illinois.

As soon as the silver dollars came to rest in Illinois, being held there at the pleasure of the owner for disposal or use, they became a part of the general mass of property within the State of Illinois, and thus subject to its exclusive taxing jurisdiction.

State of Minnesota vs. Blasius, 290 U. S. 1, 78 L. Ed. 131, 54 S. Ct. 34;

Bacon vs. Illinois, 227 U. S. 504, 57 L. Ed. 615, 33 S. Ct. 299.

If donor had taken the silver dollars from Wisconsin to Chicago to be sold or given away, and never to be returned to Wisconsin, their situs in Wisconsin for property taxation would be lost as soon as they crossed the state line.

In the case of *Delaware, Lackawanna & Western R. R. Co. vs. Pennsylvania*, 198 U. S. 341, 49 L. Ed. 1077, 25 S. Ct. 669, the question was presented of whether or not coal was permanently or only temporarily outside of the State of Pennsylvania. The coal had been transported beyond the state line to be sold in a foreign state and never to return in kind. This court states at 198 U. S. page 356:

"However temporary the stay of the coal might be in the particular foreign states where it was resting at the time of the appraisement, it was definitely and forever beyond the jurisdiction of Pennsylvania."

The Judge of the Circuit Court for Milwaukee County, Wisconsin, in his decision (R. pp. 124, 130), went so far as to invoke in substance the fiction of equitable conversion to convert the silver dollars into the intangibles, in which the silver dollars might subsequently be invested, so as to invoke the fiction of a constructive situs at domicil, as a basis for jurisdiction to impose a gift tax on the actual transfer of the silver dollars at Chicago, Illinois.

Pennsylvania, which is the only state that ever attempted to use the fiction of equitable conversion as a basis of jurisdiction, repudiated the theory in the case of *In re Paul's Estate*, 303 Pa. 330, 154 Atl. Rep. 503 at 504, where the New York and Massachusetts decisions to the contrary are cited and followed.

See also:

Connell vs. Crosby, 210 Ill. 380, 71 N. E. 350.

This effort to treat the silver dollars as intangibles is based upon the false analogy that a constructive situs of the intangibles at domicil for property taxation would confer jurisdiction on the state of domicil to impose a gift tax on the actual transfer thereof in another jurisdiction.

(2) Jurisdiction to impose the income tax is not analogous.

The income tax is an annual tax which has been substituted for the annual property tax on personal property.

It is imposed where the income is received, upon the year's net income treated as a unit. As income is usually payable at domicil it is not unreasonable to hold that it is received at domicil in the exercise of the right to receive protected by the state of domicil.

Lawrence vs. State Tax Commission of Mississippi, 286 U. S. 276, 76 L. Ed. 1102, 52 S. Ct. 556;
People of the State of New York vs. Graves, 300 U. S. 308, 81 L. Ed. 666, 57 S. Ct. 466.

In *Guaranty Trust Company of New York vs. Commonwealth of Virginia*, 305 U. S. 19, this court states at 23, 83 L. Ed. 16, 59 S. Ct. 1, at 3:

> "Here, the thing taxed was receipt of income *within* Virginia by a citizen residing there. The mere fact that another state lawfully taxed funds from which the payments were made did not necessarily destroy Virginia's right to tax something done *within her borders.*" (Italics ours.)

A gift, however, is not payable at domicil of donee. It is not made in payment of an obligation which has a constructive situs at domicil of the donee. The right to make or receive a gift is exercised and enjoyed where the gift is actually made.

(3) Jurisdiction to impose an inheritance or estate tax is not analogous.

Two aspects of such jurisdictions must be considered: (a) the fiction that the personal estate of a decedent wherever physically located has a constructive situs in the state of his domicil; (b) the theory that succession is a mere license or privilege, the enjoyment of which may be conditioned even to the extent of requiring that the tax be measured by property which never belonged to decedent, or had been given away prior to his death.

(a) Constructive situs at domicil.

How, when and where title to personal property passes on death has given rise to conflicting theories.

Beale, Conflict of Laws (1935), § 300.1 pg. 1026, §303.2 pg. 1031.

Obviously, the place of death should be disregarded because it might occur in an enemy or uncivilized country. The domicil of decedent at the time of his death is the most appropriate place for the administration of his personal estate—tangible or intangible. Succession to the entire personal estate, tangible and intangible, wherever located, was therefore assumed by comity to take place by operation of law at the domicil of the decedent at the moment of death, and to be governed by the laws of such jurisdiction.

Blackstone vs. Miller, 188 U. S. 189, 47 L. Ed. 439, 23 S. Ct. 277.

To support such conclusion, the maxim or fiction of *mobilia sequuntur personam,* is sometimes invoked, which fiction assumes, contrary to the fact, that all of the personal estate—tangible or intangible—is located at domicil at the instant of death.

When inheritance and estate taxes were invented, the state of domicil was at first permitted to impose the tax in respect to all of the personal estate, tangible or intangible, because such property had a fictitious situs in the state of domicil, and descended in accordance with its laws.

States where tangible personal property was permanently located also asserted jurisdiction to impose inheritance taxes in respect thereto. The transfer at death being an assumed transfer taking place by operation of law, might be assumed to take place in two different places at

the same time. Solely to avoid double taxation, this court has held that when the tangible personal property is located in a state other than that of domicil, the fiction of *mobilia sequuntur personam* should not apply, unless the property was merely temporarily without the state of domicil.

Frick vs. Pennsylvania, 268 U. S. 473, 69 L. Ed. 1058, 45 S. Ct. 603.

If donor had died a resident of Wisconsin while still holding the silver dollars in Chicago, the silver dollars would not have had a constructive situs in Wisconsin for inheritance tax purposes.

Blodgett vs. Silberman, 277 U. S. 1, 72 L. Ed. 749, 48 S. Ct. 410;

Frick vs. Pennsylvania, 268 U. S. 473, 69 L. Ed. 1058, 45 S. Ct. 603;

City Bank Farmers Trust Co. vs. Schnader, 293 U. S. 112, 79 L. Ed. 228, 55 S. Ct. 29.

The importance of the intent of the owner is disclosed in the latter case.

As the donor is not dead, and did not make the gift in contemplation of death, and may not die a resident of Wisconsin, the question of constructive situs of the silver dollars under inheritance or estate tax laws is academic, especially as such constructive situs would have no possible bearing on the question of jurisdiction of Wisconsin to impose a gift or sales tax on an actual transfer consummated in another state.

(b) Right to condition succession.

It was also recognized at an early date that inheritance is not a right, but a mere privilege or license to the grant-

ing of which a state might annex such conditions as it saw fit.

Mager vs. Grima, 8 Howard 490;
Magoun vs. Ill. Trust & Savings Bank, 170 U. S. 283, 42 L. Ed. 1037, 18 S. Ct. 594.

The State of domicil, by reason of its control of the estate of a decedent and its right to condition the succession thereto, may impose an inheritance or estate tax measured by property constructively within its jurisdiction or never owned by decedent, by property given away by him in contemplation of death, or located in another state.

Whitney vs. Tax Commission, 84 L. E. 584, 60 S. Ct. 635;
Pearson vs. McGraw, 308 U. S. 313, 84 L. Ed. 139, 60 S. Ct. 211;
Maxwell vs. Bugbee, 250 U. S. 525, 63 L. Ed. 1124, 40 S. Ct. 2.

The basis of jurisdiction of a State to impose its estate tax in respect to a gift made in contemplation of death, or to take effect in possession or enjoyment at death, is not necessarily jurisdiction of the gift, but jurisdiction of the estate of the resident decedent, with the right to require payment of a tax measured by the gift as though the gift had never been made, provided, that to do so is deemed reasonable when viewed in the light of the effect of the gift and the circumstances surrounding the making thereof.

States have usually held, as has been held by Wisconsin, that the inheritance or estate tax as applied to gifts in contemplation of death, does not attach when the gift is made. It attaches only on the death of donor. The gifts, together with the amount of the estate left by donor at the time of his death, constitute his estate for inheri-

tance tax purposes, taxable at the values and rates as of the date of his death.

Will of Uihlein, 187 Wis. 101.

In determining whether it is reasonable to include the value of the gift in the estate, the effect of the gift is usually examined to ascertain whether it is in effect a testamentary disposition and by reason of the gift the state of domicil has been deprived of inheritance or estate taxes which it might otherwise have collected. If the gift was of real estate or tangible personal property permanently located in another state, the state of domicil would not be deprived of taxes by reason of the gift.

Keeney vs. New York, 222 U. S. 525, 56 L. Ed. 299, 32 S. Ct. 105.

In *Bullen vs. Wisconsin,* 240 U. S. 625, 60 L. Ed. 830, 36 S. Ct. 473, the transfer was actually made in Chicago, though a power to revoke the transfer was retained. The transfer was of intangibles which would have formed a part of the estate of decedent in Wisconsin if they had not been transferred. It was therefore deemed reasonable that the values of such intangibles should be included in the estate of the decedent, who was a resident of Wisconsin at the time of his death, even though Wisconsin may not have had jurisdiction of the making of the gift.

Respondents cite as decisive of the present case, *Pearson vs. McGraw,* 308 U. S. 313, 84 L. Ed. 139, 60 S. Ct. 211. In that case a resident of Oregon, *in contemplation of death,* transferred by trust instrument executed in Oregon, a large portion of his estate, which then had a business situs in Chicago, and had been converted into Federal reserve notes, for the purpose of making the transfer.

On his death, Oregon acquired control of his estate and jurisdiction to impose its estate tax thereon, including the value of this gift made in contemplation of death, if to do so would not violate the due process clause of the XIV Amendment to the Constitution of the United States. This court held that the inclusion of the value of such gift in the estate would not violate the XIV Amendment.

If the Federal reserve notes should be deemed tangibles, permanently located in Chicago, the gift would not deprive Oregon of its estate taxes. This court looking through form to substance determined that the effect of the gift was to transfer in contemplation of death a large portion of decedent's intangible wealth.

It should be observed that a jurisdictional question was not involved. Obviously Oregon had jurisdiction of the estate, and the sole question was whether or not Oregon might use as a measure for the tax which it had jurisdiction to impose, the value of the gift made in Chicago in contemplation of death.

It is not believed that this court intended to hold that tax avoidance could be made a basis of jurisdiction, or that a state could tax ordinary gifts or sales made by one of its residents, not in contemplation of death, in another state.

From the foregoing discussion of the basis of jurisdiction to impose annual property taxes, annual income taxes, and estate and inheritance taxes, it is evident that these analogies cannot be used as analogies to destroy the simple proposition so well stated in *Great Atlantic & Pacific Tea Co. vs. Grosjean*, 301 U. S. 412, at 424, 81 L. Ed. 1193, 57 S. Ct. 772 at 776-777, that a state may not lay an excise or privilege tax upon the exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed.

The domicil of the parties, and the constructive or fictitious situs of the property transferred is immaterial.

If the State of Wisconsin desires to tax indirectly gifts or sales made in another state, it must do so by some such tax as was approved by this court in *Henneford vs. Silas Mason Co.*, 300 U. S. 577, 81 L. Ed. 814, 57 S. Ct. 524.

C — Tax avoidance can not be made the basis of jurisdiction to impose the tax.

Respondents have cited *Pearson vs. McGraw*, 308 U. S. 313, 84 L. Ed. 139, 60 S. Ct. 211, as though it held that in every case where there was an attempted tax avoidance this court would disregard actualities and base jurisdiction to impose the tax on what the court assumed to be the substance or intent of the transaction. We do not believe that the case goes to this extent.

So far as we have been able to ascertain, tax avoidance has never been made the basis of jurisdiction to impose the tax.

The performance of an act in another state for the express purpose of avoiding payment of an excise tax imposed by the state of domicil does not confer jurisdiction on the state of domicil to impose an excise on such act.

Persons frequently go to another state to avoid a sales tax imposed by the state of their domicil. The only way to discourage such practice seems to be a tax such as was approved by this court in *Henneford vs. Silas Mason Co.*, 300 U. S. 577, 81 L. Ed. 814, 57 S. Ct. 524.

It has long been established that

> "Anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose

that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes."

Helvering vs. Gregory, 69 Fed. (2d) 809, affirmed 293 U. S. 465;

United States vs. Isham, 17 Wallace 496.

The numerous decisions dealing with the distinction between tax evasion and tax avoidance are collected and analyzed in "Tax Evasion and Tax Avoidance" 38 *Columbia Law Review* 80.

Tax avoidance has been criticised in some of the earlier cases, and courts of equity have refused to use their extraordinary powers to assist tax avoidance.

Mitchell vs. Commissioners, 91 U. S. 206, 23 L. Ed. 302.

We have found no case decided by this court which made the purpose to avoid a tax the basis of tax liability. See a similar statement by Mr. Justice Hand, in *Chisholm vs. Commissioner of Internal Revenue,* 79 Fed. (2d) 14, at 15.

Also see quotations from English cases in *Sawtell vs. Commissioner of Internal Revenue,* 82 Fed. (2d) 221, at 222.

When jurisdiction is not involved, courts may look through form to substance and examine the purpose of the transaction in order to determine whether or not the transaction falls within the intent of the statute in granting an exemption, or is of such a nature that the state of domicil having jurisdiction of the estate of a decedent, might reasonably condition the succession on payment of a tax measured by such transaction. Cases of this type are:

Gregory vs. Helvering, 293 U. S. 465, 79 L. Ed. 596, 55 S. Ct. 266;

Pearson vs. McGraw, 308 U. S. 313, 84 L. Ed. 139, 60 S. Ct. 211.

In the case of *Gregory vs. Helvering, supra,* the exemption provided in corporate reorganizations was denied, be-

cause, though each step specified in the act was followed, no reorganization was in fact attempted.

The cases cited in *Pearson vs. McGraw, supra,* are of this nature, with the exception of *Shotwell vs. Moore,* 129 U. S. 590, 32 L. Ed. 827, 9 S. Ct. 362, which is sometimes cited as holding that a person may not escape taxation by temporarily changing his property into a different form for the express purpose of avoiding the tax. The point actually involved in that case was the validity of a statute which taxed a monthly *average* bank balance when the bank balance had been reinvested in tax exempt securities on the taxing date. The taxpayer avoided paying a tax on his non-existent bank balance on the given date and on the tax exempt securities into which it had been converted, but was caught in the meshes of the above statute, which was held to be valid.

The fact that in the present case one of the purposes of donor in going to Chicago to make the transfer, was to avoid the Wisconsin gift tax does not confer jurisdiction on Wisconsin to tax such transfer. The use of the silver dollars, instead of a depreciated currency, was an appropriate means of making the gift. It was certainly as appropriate as the use of numerous small checks to pay a single obligation as in *United States vs. Isham,* 17 Wallace 496 and more so than the use of wheat or cattle.

IV.

A Tax Imposed Without Jurisdiction Deprives the Taxpayer of Property Without Due Process of Law, as Forbidden by Section 1 of the XIV Amendment to the Constitution of the United States.

The proposition that taxation without jurisdiction violates the due process clause of the XIV Amendment to the

Constitution of the United States, has been established in *Frick vs. Pennsylvania,* 268 U. S. 473, 69 L. Ed. 1058, 45 S. Ct. 603, and *Wheeling Steel Corporation vs. Fox,* 298 U. S. 193, 80 L. Ed. 1143, 56 S. Ct. 773.

V.

A Substantial Federal Question Is Presented.

The important federal question presented is whether the State of Wisconsin may impose a tax on the exercise by one of its residents in another state, of his natural right to make a transfer of his property by gift, even though made in another state for the express purpose of avoiding the Wisconsin gift tax.

Conclusion.

It is respectfully submitted that substantial Federal questions are presented by this appeal, and that the motion to dismiss the appeal or affirm the judgment of the Supreme Court of the State of Wisconsin, should be denied.

Respectfully submitted,

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